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COURT OF CRIMINAL APPEALS
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NO. PD-0439-16

IN THE COURT OF CRIMINAL APPEALS

STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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ABEL ACOSTA, CLERK

ROBERT RODRIGEZ, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from the 274th District Court
Guadalupe County, Texas

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGES**

CONSTITUTIONS

STATUTES

OTHER

INTRODUCTION IN REPLY TO STATE'S BRIEF

Appellant has found himself in difficult and unfamiliar territory in drafting a response to the State's brief because he agrees with much of its assertions:

- The State should not be entitled to rely on transferred intent to supply the mens rea for a charged offense with that of a lesser-included offense. [1]

- [The Court's interpretation of transferred intent] was one that subjects defendants to punishment far beyond their actual culpability. . .[2]

- Although Thompson did not declare as much, it is hard to avoid the conclusion that an interpretation of a broadly applicable penal statute that penalizes people far beyond their actual culpability should be deemed absurd *ab initio*.[3]

- It also seems unlikely that section 6.04(b)(1) was intended to broadly permit the transfer of intent from lesser-included offenses to their greater counterparts given the number of offenses that are designed to do so without reliance on outside statutes.[4]

- There is nothing absurd about prohibiting the State from proving intent with proof that the defendant intended a lesser-included offense.[5]

If any concept in criminal law is clear, it is this: responsibility for a criminal act rests, not on the act alone, but in equal part on the mental state under which the person acted. "[W]rongdoing must be conscious to be criminal."[6]

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[1] State's Brief, 7
[2] State's Brief, 14
[3] State's Brief, 25
[4] State's Brief, 25
[5] State's Brief, 35
[6] *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015), quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952).

Based on this Court's decisions in *Thompson v. State*[7], and *Louis v. State*[8], the decision of the Court of Appeals in this case should be affirmed. Appellant was indicted for aggravated assault, charged with intentionally, knowingly or recklessly causing serious bodily injury.[9] The application paragraph of the jury charge repeated the indictment language, but the abstract portion tracked the statute, defining aggravated assault as the commission of assault which results in serious bodily injury.[10] The State requested an instruction on transferred intent, and the defendant's objection to said instruction was overruled.[11] Rodriguez then requested an instruction on mistake-of-fact—that he was mistaken in the type of injuries that were being inflicted, or could result from his actions—which the trial court denied. Based on this Court's opinion in Thompson, the Court of Appeals held that this was error, and reversed and remanded.

This Court granted the State's petition for review on one ground:

> Does the submission of an instruction on transferred intent entitle a defendant to an instruction on mistake of fact even if the greater offense does not have any additional culpable mental state and there is no evidence that the defendant harbored a mistaken belief?

The State seems to miss the very essence of the doctrine of transferred intent: if the greater offense has no additional culpable mental state, then it has

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[7] 236 S.W.3d 787 (Tex. Crim. App. 2007)
[8] 393 S.W.3d 246 (Tex. Crim. App. 2012)
[9] CR 3
[10] CR 52, 57
[11] CR 55

been transferred or substituted from a lesser offense. By definition, no higher level offense to which intent is transferred has any additional culpable mental state. This is the doctrine of transferred intent.

I. Response to State's argument that Appellant was not entitled to "mistake of fact" under traditional rules.

Mens Rea for Serious Bodily Injury

The crux of the State's argument is that there is no entitlement to a mistake-of-fact instruction in this case because the aggravated assault statute does not require proof of *mens rea* as to serious bodily injury; and alternatively, there is no evidence in the record that Appellant formed a mistaken belief that would negate any culpable mental state attached to serious bodily injury. [12]

The state acknowledges the "common practice" of ascribing culpable mental states to the "aggravating elements" of assault, i.e. requiring proof that serious bodily injury was caused intentionally, knowingly or recklessly, but suggests this practice is wrong. Further, the state asserts that the corresponding pattern jury charge[13] is incorrect, as are the decisions of "numerous courts, including this one . . ."[14]

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[12] State's Brief at 8.

[13] TEXAS CRIMINAL PATTERN JURY CHARGES—CRIMES AGAINST PERSONS (State Bar of Texas 2011) § C8.14 p.215

[14] *Citing, e.g., Ex parte Castillo*, 469 S.W.3d 165, 171 (Tex. Crim. App. 2015) and *Boney v. State*, 572 S.W.2d 529, 532 (Tex. Crim. App. 1978)

Aggravated assault is defined as follows:

(a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:

(1) Causes serious bodily injury to another, including the person's spouse; or
(2) Uses or exhibits a deadly weapon during the commission of the assault.[15]

A person commits the offense of assault if he "intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse."[16]

Appellant agrees that, based on the plain text of the statute, it is certainly a reasonable interpretation that the legislature intended no mental state to attach to either of the circumstances which elevate an assault offense to aggravated assault. In fact, several courts have concluded that no *mens rea* is required regarding the use or exhibition of a deadly weapon.[17] However, only one has clearly stated (in an unpublished opinion) that the same is true of serious bodily injury.[18]

The State concludes that "[b]y drafting aggravated assault as it did. . . the Legislature made it clear that someone who commits an assault is responsible for

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[15] TEX. PENAL CODE § 22.02(a)(1)
[16] TEX. PENAL CODE § 22.01
[17] *See Butler v. State*, 928 S.W.2d 286, 287-88 (Tex. App.—Fort Worth 1996, pet. ref'd); *Peacock v. State*, 690 S.W.2d 613, 615-16 (Tex. App.—Tyler 1985, no pet.); *Pass v. State*, 634 S.W.2d 857, 860 (Tex. App.—San Antonio 1982, pet. ref'd); see also *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995) (holding that intent to use automobile as deadly weapon need not be shown to find that defendant used his automobile as a deadly weapon).
[18] *Fancher v. State*, No. 10-09-00121-CR, 2011 Tex. App. LEXIS 2317, at *7 (App.—Waco 2011, pet. ref'd.)(not designated for publication)("The State is also correct that serious bodily injury is an aggravating factor and does not require a culpable mental state.")

the serious bodily injury he causes regardless of any additional intent."[19] In other words, *intent to commit simple assault is transferred to the aggravated assault.* Is this not a distinction without a difference? The *mens rea* attached to the assault merely transfers to the aggravated offense, no proof of separate intent is required, and we are back again to reliance on transferred intent. In its brief, the State expressed disapproval of "rely[ing] on transferred intent to supply the *mens rea* for a charged offense with that of a lesser-included offense."[20] Appellant wholeheartedly agrees. Yet, that is exactly what the State is suggesting the Legislature intended in the aggravated assault statute. Regardless of legislative intent, however, the jury charge in this case included an instruction on transferred intent; therefore, Appellant was entitled to a mistake-of-fact instruction under *Thompson*.

II. Response to State's Argument that the Thompson/Louis "Reflexive" Model of Entitlement Should be Reconsidered.

There is a greater and overriding issue involved that needs to be addressed. Ultimately, whether *mens rea* is transferred explicitly or implicitly by statute, or whether by action of the State or the courts, the doctrine of transferred intent should not permit the intent to commit a lesser offense to transfer to a greater offense. If 6.04(b) had a more narrow application, in keeping with the principle of

[19] State's Brief at 11.
[20] State's Brief, 7

"matching" culpability, and if intent could never be transferred from a lesser to a greater offense, the responsive need for the *potentially* mitigating defense would greatly diminish. Because *Honea v. State*[21] represents the first significant broadening of the doctrine, it's holding should be revisited.

The problem with Section 6.04(b) and *Honea v. State*

6.04 (b) of the Texas Penal Code provides that a person is criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different offense was committed; or a different person or property was injured, harmed or otherwise affected. On its surface, this statute appears relatively straight-forward, and in fact, sensible. As stated by one court, "Subsection (b)(2) preserves a narrow version of the transferred intent doctrine derived from the prior constructive malice statutes (Penal Code arts. 42 to 44) by the Texas courts, e.g., *Hayes v. State*, 171 Tex. Crim. 646, 353 S.W.2d 25 (1962); *Covert v. State*, 113 S.W.2d 556 (Cr. App. 1938). Under this subdivision, for example, if D shoots with intent to kill V, but misses and unintentionally kills W, he is nevertheless guilty of murder -- as he would be under the law of every American jurisdiction."[22]

In this example, D possessed the intent to kill, and the fact that he killed a

[21] 585 S.W.2d 681 (Tex. Crim. App. 1979)
[22] *Garcia v. State*, 791 S.W.2d 279, 280-81 (Tex. App.—Corpus Christi 1990)

different person does nothing to minimize or negate his original intent. The doctrine of transferring intent should be narrowly applied, resting on the principle that the transfer requires at least similar, if not "equivalent intents be involved."[23] .

"Equivalent intents," of course, were clearly not present in *Honea*. Honea admitted to robbing his victim, and leaving him bound and gagged on a dusty floor. When the victim died from suffocation resulting from inhaling dust and vomiting, Honea was convicted of aggravated robbery, even though he could not have foreseen, much less intended the victim's death. In other words, Honea's intent to commit robbery was sufficient to convict him of a crime he clearly did not intend: aggravated robbery. This case has been described by one commentator as "the lottery approach to criminal justice in Texas:

> The decision to hold Honea responsible for a more serious crime because of the unintended and unanticipated outcome signaled a continuing, expansive use of the "lottery approach" to criminal justice in Texas. Unless the State wishes for retributive purposes alone to punish people like Honea for the unintended and unforeseeable harm that is caused by their conduct, the interpretation of section 6.04(b)(1) must be limited at least to that which reasonably would enter the imagination of the actor. Otherwise, no incentive will exist for criminals to act more carefully; they will not be deterred by the possibility of a level of punishment they cannot foresee; and the principle of individual responsibility based on mens rea will be undermined.[24]

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[23] Gerald S. Reamey *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. Tex. L. Rev. 59, 76 (2005)
[24] *Id.*

An expansion of culpability such as that seen in *Honea* and *Thompson* presents a due process[25] violation, in that it significantly lowers the burden on the State to prove the culpability element beyond a reasonable doubt.[26] Rather than allowing the State to prove a lesser *mens rea*, and then try to fix it with a burden on the defense to request a mistake of fact instruction, we should simply hold the State to its burden to prove the mens rea necessary for the offense, greater or lesser, and not rely on lesser intent to prove a greater crime. This should hold no matter whether the transferred intent is contained in statute, such as the aggravated assault and aggravated robbery statute, or whether it is a State or court creation in a particular case.

The State's Criticism of *Honea*

As the State points out in its brief, "Thompson asked this Court to determine whether *Honea* was wrongly decided and 'criticize[d] the opinion for failing to seriously analyze the issue."[27] The State continues that criticism here, as does Appellant, albeit for different reasons.

The State agrees with the holdings in *Honea*, but disagrees with the reasoning. The State argues that transfer of intent was unnecessary because the

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[25] U.S. CONST. Amend. XIV

[26] *See Reamey, G.* proof that the actor negligently caused a death in the course of robbery cannot substitute for the more difficult proof that it be caused intentionally)

[27] State's Brief, 22, citing *Thompson*, 236 S.W.3d at 790.

aggravated robbery statute, dispenses with any requirement that the defendant intend to cause serious bodily injury.[28] The offense of aggravated robbery is committed when a person commits robbery and causes serious bodily injury.[29] Because the statute for aggravated robbery basically parallels that of aggravated assault, the State's argument is the same—no transfer of intent was necessary. Further, says the State, the court's rejection of Honea's mistake-of-fact was justified because, "[w]ithout a mental state attached to serious bodily injury, there was nothing to negate using section 8.02(a)."

Again, the State fails to recognize that this statute, like the aggravated assault statute, already transfers intent from robbery to aggravated robbery. If no additional culpable mental state is required for serious bodily injury, the intent from the robbery must transfer. The State is not relieved of its burden to prove a culpable mental state at all—it must prove the *mens rea* associated with the lesser offense in order to prove the greater offense.

Thompson follows *Honea*, but tries to help

"This resulting interpretation was one that subjects defendants to punishment far beyond their actual culpability, making 'necessary' a redefinition of mistake-of-fact (that neither party requested) to mitigate the inherent unfairness.[30]

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[28] State's Brief, 24.
[29] TEX. PENAL CODE §29.03(a)(1)
[30] State's Brief, 14

This Court's observation in *Thompson* that transferring intent from a lower level offense to a higher level offense creates "the concern that a person could be penalized far beyond his actual culpability," is an understatement.[31] The Court's next observation, that the availability to the defendant of a mistake of fact instruction "mitigates greatly" this concern is an overstatement.[32]

The instant case illustrates the difficulty with relying on a mistake of fact instruction to rescue a defendant from unfair punishment. The State argues that Appellant was not entitled to a mistake instruction because the record is void of any evidence that he harbored a belief about a particular fact that would negate his culpability—on the element of causing serious bodily injury.[33] This argument has already been made and discounted in Louis[34], and it appears that entitlement to the instruction is automatic if requested in response to a transferred intent instruction. However, the State is again asking this Court to reconsider the "reflexive" model of entitlement.[35] In the instant case, the State is correct that there are no statements from Appellant which would demonstrate a reasonable error on his part, but it is clear from the record that the injuries sustained by the victim in this case were not those typically associated with the type of assault that was carried out, either by

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[31] *Thompson* at 800.
[32] *Id.*
[33] State's Brief, 11
[34] *Louis v. State*, 393 S.W.3d 246 at 252.
[35] State's Brief, 12.

Appellant or his brother/co-defendant.[36] Appellant relies on this evidence, then, along with the entitlement mandated by *Thompson* and *Louis* to assert this defense. That appears to be enough under the reasoning of these cases, even if it falls short in a traditional mistake-of-fact analysis, and if the expansive interpretation of 6.04(b) is to continue, so must this "reflexive" entitlement. "We held in *Thompson*, 236 S.W.3d at 789, that a defendant who is subject to a transferred-intent provision is entitled, upon request, to a mistake-of-fact instruction. Appellant was indeed subjected to such an instruction, thus upon his request, he was entitled to have a mistake-of-fact instruction included in the jury charge. [37]

Requiring a defendant to comply with the traditional requirement to introduce some additional evidence of mistake is unworkable, and violates due process. There will be many defendants who find themselves facing a more serious offense based on intent to commit a lesser offense and unable to produce a scintilla of evidence of mistake of fact, rather than an absence of intent. The better answer is to simply make the State prove the greater *mens rea* beyond a reasonable doubt.

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[36] RR, Vol. 3, pp. 172-178

[37] *Louis v. State*, 393 S.W.3d at 253

Louis illustrates the danger

Louis's jury charge included transferred intent language eight times: in the portion of the charge for capital murder and thereafter for each of the seven lesser-included offenses. This case alone illustrates the lessening burden on prosecutors to prove culpability beyond a reasonable doubt. It defies logic that a person be subjected to eight different charges, ranging all the way to capital murder, with each one open to the jury for conviction, as long as the State proved intent to commit a lesser charge. Truly, due process is absent in this scenario, and unlikely to be restored by jury consideration of mistake.

Use of Mistake Presents Multiple Legal and Practical Problems

Appellant agrees with the State that use of mistake is problematic, both legally and practically, and urges the Court to consider its arguments, with particular attention to the unfairness of burdening the defendant with taking action to mitigate "undeserved culpability," arising from substituting intent from lesser to greater offenses.

The State suggests that "[t]he only way to prevent the substitution provided by transferred intent should be to challenge the culpability to State is relying upon—the culpability attached to the lesser offense.[38] This is probably true under the current interpretation of transferred intent. However, as stated, this

[38] State Brief, 28.

interpretation should be revisited, with a focus on narrowing undeserved culpability, rather than expanding it.

III. Response to State's Argument: The Correct Question: Are the Offenses "Different" or "the Same" Under *Blockburger*?

The State presents a viable alternative; therefore, Appellant agrees and adopts this section of the State's brief in its entirety, but with one addition: This Court should recognize that statutes such as the aggravated assault and aggravated robbery statutes merely codify transferred intent. As such, the State must face the burden of proving *mens rea* associated with the greater offense, not the lesser, even if it appears at first glance that the Legislature dispensed with *mens rea* for these so-called "aggravating factors." "The Legislature has considerable discretion in defining crimes and the manner in which those crimes can be committed. That discretion is limited only by the Due Process Clause of the federal constitution and the Due Course of Law provision of the Texas Constitution.[39]

IV. Response to State's Argument: In the Alternative, *Thompson* and *Louis* are Distinguishable.

Appellant's case is not distinguishable. Whether by statute or by jury instruction, the state sought to prove the greater offense (aggravated assault) by proving the lesser (assault) and transferring *mens rea*. Whether it was necessary or not is irrelevant—the jury was instructed on transferred intent, to which Appellant

[39] *Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008)

objected. His request for a mistake of fact instruction was denied, which was error under *Thompson* and *Louis*. The Court of Appeals got it right.

CONCLUSION

The State concludes by suggested that Section 6.04(b)(1) should not permit the State to rely on a lesser-included offense to supply what its evidence cannot. Appellant concurs and suggests that statutes defining higher level offenses without requiring higher level *mens rea* should not permit similar reliance. Appellant joins the State in asking this Court to re-evaluate the doctrines of transferred intent, and the resulting entitlement to a mistake-of-fact instruction. These holdings should be reconsidered, and narrowed, and Appellant's case reversed and remanded based on error in substituting intent of the lesser for the greater offense.

However, if this broad interpretation of Tex. Penal Code 6.04(b)(1) stands, defendants who find themselves subject to such substitute intent should remain entitled to a mistake of fact instruction, in order to mitigate in at least some measure the harsh result of being found culpable for a result never intended or contemplated. And because Appellant's request for this instruction was denied, the Court of Appeals decision to reverse and remand should be affirmed.

PRAYER

WHEREFORE, Appellant Robert Rodriguez prays that the Court of Criminal Appeals affirm the decision of the Court of Appeals.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to the Microsoft word count application, this document contains 3425 words.

/s/ Susan Schoon
Susan Schoon

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of November, a true and correct copy of this brief was served by efile/email service to the following:

John Messinger, Assistant State Prosecuting Attorney
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/s/ Susan Schoon
Susan Schoon